In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-931

CLIFFORD C. TERRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his dismissal as a Post Office employee was based on his written statement acknowledging misusing official funds, which statement was allegedly coerced by fear of losing his job. He thus asserts that he should be reinstated in his former position with appropriate back pay and benefits. The Court of Claims rejected petitioner's contention and granted summary judgment in favor of the United States (499 F.2d 695; Pet. App. A).

Petitioner was a window clerk at the United States Post Office in Houston, Texas. Unusual fluctuations in his cash account led the Houston Postmaster to request an audit of his account. On March 17, 1969, an audit by a United States Postal Inspector revealed a shortage in the account. Just before the audit, petitioner was seen trying to sneak money from his pocket into the cash

drawer. After questioning by the Postal Inspector, petitioner admitted that he had issued two money orders to himself and made only partial payment for them. (Pet. App. A, p. 16.) Petitioner signed a statement to this effect. He also produced the two money order receipts. Petitioner's statement specifically declared that the statement was "made of my own free will," that "I have been advised that I do not have to make any statement," and that "[n]o threats or promises have been made to me" (Pet. App. A, p. 32).[1]

Petitioner was formally charged with misuse of funds and discharged by the Regional Director of the Post Office Department (Pet. App. A, pp. 16-17). After a hearing, this ruling was sustained by the Post Office Department on appeal (Pet. App. E, pp. 41-43).

After a further hearing on the merits, the Civil Service Commission found that the dismissal was warranted (Pet. App. F, pp. 44-51). The Civil Service Commission's Board of Appeals and Review affirmed (Pet. App. G, pp. 52-56). Petitioner then sued in the United States Court of Claims.

1. Petitioner maintains that his written statement of March 17, 1969 could not be used as evidence in the administrative proceedings because, he argues, he signed the incriminating statement only when threatened with dismissal for failure to cooperate (Pet. 2, 11). He thus contends that this case is governed by cases holding that a government employee may not be dismissed for re-

---

[1]The Postal Inspector was authorized by regulation to conduct criminal investigations and make arrests. 39 C.F.R. 831.9. As a result of the investigation, petitioner was later indicted, but the charges were dropped.

fusing to waive the Fifth Amendment privilege against self-incrimination. *Gardner* v. *Broderick*, 392 U.S. 273; *Uniformed Sanitation Men Association, Inc.* v. *Commissioner of Sanitation*, 392 U.S. 280; *Kalkines* v. *United States*, 473 F.2d 1391 (Ct. Cl.).

The facts of this case, however, as the Court of Claims correctly held, differ significantly from those cases, for there was here no coercion and no threat of dismissal. The Postal Inspector stated at the agency hearing that he had never threatened petitioner with discharge for failure to admit guilt (Pet. App. A, p. 24). The Postmaster also testified that petitioner never suggested, when signing the statement or at a subsequent meeting, that the statement had been obtained by coercion (*ibid.*). The testimony of these men constitutes substantial evidence and supports the finding of the Civil Service Commission that petitioner's statement was not coerced. Finally, petitioner's own statement confirms that it was made without coercion and without any threat of dismissal. Thus, petitioner is incorrect in contending that this case offers a vehicle for determining whether a statement given after waiving immunity on pain of dismissal can be used in a dismissal proceeding (Pet. 5-6; see *Garrity* v. *New Jersey*, 385 U.S. 493; *Gardner, supra*, 392 U.S. at 278-279). As petitioner was not required to make the statement, his privilege against self-incrimination is not implicated. Cf. *Gardner, supra*, 392 U.S. at 274; *Sanitation Men, supra*, 392 U.S. at 282, where employees were specifically threatened with dismissal for refusal to waive their privilege.

Petitioner further claims, however, that even if no overt threats of dismissal were made, his statement was nonetheless inadmissible because Post Office Department regulations required employees to give incriminating information or face dismissal from employment. The rel-

evant regulation (Postal Manual Section 744.17), however, merely states that postal employees "shall cooperate in any postal investigation." (Pet. App. C, p. 37). Unlike the statutes, regulations and explicit threats at issue in the cases cited at p. 3, *supra*, this regulation does not require disclosure of incriminating information known to an employee or mandate dismissal for employees who refuse to give incriminating evidence. Rather, as the Court of Claims correctly held, the regulation "only require[s] postal employees to do what every citizen is required to do, *i.e.*, to come forward and speak where one has relevant knowledge of a matter under investigation by authorized officials" (Pet. App. A, p. 25). The regulation, therefore, does not abrogate the Fifth Amendment privilege against self-incrimination, and does not compel immunization of employees from the consequences of their voluntary statements.

2. Even without the statement, there is substantial evidence to support the finding that petitioner misused official Post Office Department funds. It is uncontested that, prior to the audit itself, the Postal Inspector observed petitioner—who was aware that an audit was about to commence—attempting to transfer money from his pocket into the cash drawer. The Inspector told petitioner to put the money back into his pocket (Pet. App. A, p. 16). This evidence, together with the shortage in petitioner's accounts, adequately supports petitioner's dismissal for misuse of funds.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.